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IN THE

Supreme Court of the United States

October Term, 1959

No. 717

WILLIAM H. CALEY, individually and as assignee, owner and on behalf of the owners of 17,306 shares of the common stock of the Superior Sugar Refining Company,

Respondent,

AGAINST

ALBERT FLEGENHEIMER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

WERNER GALLESKI,
Member of the Bar of the Supreme Court of the United States,
Attorney for Petitioner,
70 Pine Street,
New York 5, New York

Of Counsel,

ARNOLD DAVIS,
Member of the Bar of the Supreme Court of the United States,
50 Broadway,
New York 4, New York

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

WILLIAM H. CALEY, individually and as assignee, owner and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company,

Respondent,

AGAINST

ALBERT FLEGENHEIMER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Supreme Court of the United States:

Albert Flegenheimer, the petitioner herein, prays that a writ of certiorari to review the final order of the Supreme Court of Wisconsin, made and entered on December 1, 1959, and the judgment underlying such order, made and entered on October 6, 1959.

The Opinion Below

The opinion of the Supreme Court of Wisconsin is reported in 8 Wis. 2d 72, 98 N. W. 2d 473. A copy of such opinion is annexed hereto and marked Exhibit "A".

Jurisdiction

The final order of the Supreme Court of Wisconsin denying a rehearing of its decision and judgment was made and entered on December 1, 1959, a copy of such order being annexed hereto and marked Exhibit "B". The judgment underlying such order was made and entered on October 6, 1959 and a copy thereof is annexed hereto and marked Exhibit "C".

No application was made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Revised Rules of the Supreme Court and Title 28, U. S. C. sections 2101 (c) and 2104, on the ground that review by the Supreme Court of the United States, by writ of certiorari, is sought of an order denying rehearing of a decision and judgment of affirmance on appeal by the Supreme Court of Wisconsin. Certiorari is sought on the grounds that the Supreme Court of Wisconsin has rendered a decision of an important federal question of substance not heretofore determined by this court and or has decided same in a way probably not in accord with the applicable decisions of this Court.

Questions Presented for Review

1. Whether or not section 263.12, Wisconsin Statutes, is constitutional in the light of the interpretation of the term "jurisdiction over the subject matter" to the effect that objections based upon non-identification and non-identifiability of party plaintiff from the record are automatically waived unless first raised by demurrer or in the answer.

2. Whether or not section 263.12, Wisconsin Statutes, was applied by the Supreme Court of Wisconsin in a

manner so as to deprive the petitioner of his property without due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

3. Whether or not the judgment and order of the Supreme Court of Wisconsin operated to deprive petitioner of his property without due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States when it failed to determine finally the person and capacity of party plaintiff and, consequently, the identity of the persons bound by the adjudications thereof.

4. Whether or not, where the issue of a waiver of a jurisdictional objection relating to the non-identification and non-identifiability of party plaintiff was raised in the first instance by decision of the Supreme Court of Wisconsin without affording petitioner an opportunity to be heard thereon, the denial of such rehearing operated to deprive petitioner of his property without due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

5. Whether or not a defense pertaining to the uncertainty of the capacity of party plaintiff and the identity of persons to be bound by the determination on the complaint and counterclaim relates to the power of the court to determine an issue before it so that such defense cannot be barred without a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

6. Whether or not the process in an action where party plaintiff is not identified and not identifiable can be notice to a defendant therein within the meaning of the due process clause of the Constitution of the United States.

Provisions of the Constitution of the United States in Point

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Wisconsin Statute Involved

Section 263.12, Wisconsin Statutes

Except as provided in s. 262.17, if not interposed by demurrer or answer, the defendant waives objections to the complaint except the objection to the jurisdiction over the subject matter, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action.

Manner in Which Federal Questions Sought to Be Reviewed Were First Raised

The federal questions now sought to be reviewed were first raised upon the motion for rehearing of the decision and judgment made and entered on October 6, 1959.

By the caption of the action and in his complaint, respondent indicated that he appeared in inconsistent capacities. He alleged (Appendix, p. 110):

"1. That William H. Caley * * * brings this action in his own behalf, and on behalf of numerous other stockholders of said Superior Sugar Refining Company, which cause of action was duly assigned to him by stockholders who were the owners of record of seventeen thousand three hundred ninety-six (17,396) shares of said common stock."

The allegation being legalistically incomprehensible, in a demand for a bill of particulars respondent was requested (Appendix, p. 124):

"d) State whether the present action is brought by plaintiff as a member of a class of persons who allegedly are united with him in interest.

If the present action is brought by the plaintiff as a member of such a class, please describe such class with sufficient certainty as to make it possible to ascertain all its members, and give the names and post office addresses of all members of such class as of the time of the commencement of the present action."

The bill of particulars responded (Appendix, pp. 130, 131):

"b) The plaintiff brings this present action on behalf of the other stockholders of the Superior Sugar Refining Company as shown in Exhibit A attached hereto.

c) The authority conferred by these parties was in writing and a copy of such authority is attached hereto and marked Exhibit C.

d) The present action is brought by the plaintiff as a member of a class of petitioners, united with him in interest. The names and addresses of such petitioners are set forth at length in Exhibit A."

The Trial Court concluded that the problem of a class action was not before it (Minutes, p. 134).

As to the person of the plaintiff, the decision of the Trial Court stated (Appendix, p. 102):

> "Now, this is a suit to recover the balance of $2 per share on the purchase price of 17,787 shares of stock of the Superior Sugar Refining Company. The stock was owned by the plaintiff, Mr. Caley, and 45 or 46 other stockholders who assigned their claims to Mr. Caley for the unpaid balance of the purchase price. * * * "

Thus, at the time that the appeal was filed in the Supreme Court of Wisconsin, everybody, including the Trial Court, apparently agreed that the class action was procedurally defective.

(1)

The Supreme Court of Wisconsin, in its decision, declared (Opinion, pp. 15, *et seq.*):

> "3. Plaintiff as real party in interest. The capacity in which plaintiff brings this action is not made perfectly clear."

By such declaration, the appellate court recognized at least three inconsistent possibilities of capacity of the party-plaintiff which, in turn, directly affected the operative effect of the judgment affirmed.

The substantial uncertainty wrought by such decision now affects an action presently pending in the United States District Court for the Northern Division of the Western District of Michigan.

(2)

At no point, other than in the decision of the Supreme Court of Wisconsin, was there a question concerning the operation of section 263.12, Wisconsin Statutes. In raising the argument on its own, said Court declared such section operated to exclude petitioner's rights to question the capacity of the party-plaintiff in the action.

(3)

Similarly, the Supreme Court of Wisconsin, in its decision, determined, in the first instance, that petitioner could not be heard to question the capacity of respondent to have maintained the action.

On a motion for a re-hearing of the said decision, petitioner raised, for the first time, the constitutionality of the three numbered points indicated above. Since the constitutional problems created by the appellate court had not existed prior to its decision, petitioner could not raise the respective questions at any earlier point in the proceedings.

Argument Relied Upon for Allowance of Writ

The Supreme Court of Wisconsin declared in its opinion that "(t)he capacity in which plaintiff brings this action is not made perfectly clear". It goes on to hold that respondent, Caley, may have been attempting to qualify as (a) an individual plaintiff; or (b) a trustee of an express trust authorized to sue without joinder of the beneficiaries thereof or (c) suing for the benefit of (1) many persons with a common interest or (2) very numerous parties.

In the complaint, as limited by the bill of particulars, Caley asserted to be a member of a class united in interest with and suing on behalf of the entire class.

A. The process in the action, as amplified by the complaint and bill of particulars failed to describe the party plaintiff to the extent that petitioner could interpose a legal defense to the action.

In the matter at bar a judgment was given in an action brought by one as an individual and on behalf of a number of owners of certificates of stock of Superior Sugar Refining Company. The plaintiff maintained in his bill of particulars that he was acting in the litigation on his own behalf, as the assignee of certain persons and as the representative of a class.

It is submitted, however, that the many-fold capacities in which respondent purported to act were mutually antagonistic, each giving rise to its own specific result to the exclusion of the others.

It is axiomatic that a judgment is the final expression of a litigation. In *Freeman on Judgments*, it is said:

> "§72. Must be Complete and Certain.—Inasmuch as the judgment and its enforcement is the end and aim of the whole litigation, to satisfy this purpose it must so dispose of the matters at issue between the parties that they and such other persons as may be affected, will be able to determine with reasonable certainty the extent to which their rights and obligations have been determined. • • • A test sometimes applied is that it must be so certain and definite that it may be pleaded or otherwise relied upon in subsequent proceedings as an estoppel or bar with respect to the matters adjudicated. • • • "

Concerning the varying effects of judgments given in actions favoring the varied capacities in which actions

may be brought, the *Restatement of the Law of Judgments* recites:

> "80. Representative Capacity—Persons Acting As Fiduciaries
>
> (1) Where a judgment is rendered for or against a person in an action in which he is acting solely on his own account, the rules of res judicata do not apply in a subsequent action in which he is a party solely in a representative capacity or is otherwise acting solely for the benefit of another.
>
> (2) Where a judgment is rendered for or against a person who is a party to the action solely in a representative capacity or who is otherwise acting solely for the benefit of another, of which fact the other party to the action has notice, the rules of res judicata do not apply in a subsequent action in which he is a party and is acting solely on his own account, except where he takes a position in the subsequent action inconsistent with that which he took in the first action.
>
> (3) Where a judgment has been rendered for or against a person in an action in which he is acting solely for a particular beneficiary, the rules of res judicata do not apply in a subsequent action in which he is acting for a different beneficiary."

Concerning class actions, the comments to section 80 expressly provide that such actions are governed by section 86 of the *Restatement*, which recites:

> "A person who is one of a class of persons on whose account an action is properly brought or defended in a representative action or defense, is

bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action."

Accordingly, where each capacity gives rise to its own set of rules, a party defendant to an action where inconsistent capacities are purported to be rolled into one is subjected to a conundrum as to how to formulate his defense thereto.

Such situation is akin to that presented in *Alexander* v. *Leland*, 1 Idaho 425. Therein the action was commenced by a summons addressed to "E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffth and Alonzo Leland, or John Wood, doing business as Rescue M. & M. Co., defendants." Concerning such process the court remarked:

> "From the summons it is impossible for this court to ascertain what persons composed Rescue M. & M. Co. It may be the five persons first named, or it may be John Wood alone, and the notice was either to the *former or the latter*; and, being in the alternative, it was not for the officer serving it to determine upon whom service should be had, nor can this court so determine. The only conclusion, therefore, that can be legitimately drawn is that, it being addressed to no party in particular it was not addressed to anyone, nor was it notice to anyone, and was consequently void.
>
> * * *
>
> The reasons urged against the validity of the process apply with equal force to the judgment. It is a judgment in the alternative against E. B. Johnson, E. R. Sherwin, J. W. Poe, Joseph Griffith and Alonzo Leland, or John Wood, partners, etc. If we cannot determine as to whom the summons was directed, and upon whom it was served, it follows

that we cannot determine as to the parties against whom the judgment is rendered, and for the same reasons. A judgment to be valid must be conclusive upon the subject matter, and also as to the parties to it, and must also be capable of execution. It must be so certain as to the persons that its execution may be enforced against their property. If it be a joint judgment, the execution must be against their joint property. If against one, his individual property is liable."

The problem presented in the matter at bar was raised in *Realty Trust Co., et al.* v. *Koger* (Tex. Civ. App.), 70 S. W. 2d 448. Therein the suit was instituted by appellee (a) individually, (b) as an executor of an estate and (c) as a guardian of a minor. The court observed:

"• • • No explanation of these discrepancies was offered. The judgment was in favor of plaintiff, without designating in what capacity he recovered. Clearly this presents an irregularity • • •"

In that case, however, the court resolved the irregularity by concluding that it could not operate to the prejudice of the defendant since there was no suggestion made that any person not a party to the action was not before the court and that there was no evidence which would reveal that plaintiff, in his consistent capacities, did not have full ownership of the *res* underlying the action.

Unlike *Realty Trust Co. et al.* v. *Koger*, the court below refused to resolve the discrepancy and elected to emphasize the inconsistencies of plaintiff's potential capacities.

In the matter at bar, petitioner interposed a counterclaim sounding in tort. This the Trial Court dismissed on the merits, although no proof was offered to establish the

counterclaim and petitioner sought to discontinue the same.

Insofar as the counterclaim is concerned, it was addressed to the plaintiff in the action; however, the plaintiff had at least three distinct capacities (as claimed by him and found by the Supreme Court of Wisconsin). Similarly, as in *Alexander* v. *Leland*, *supra*, Caley, as the party defendant to the counterclaim, could not be perfectly addressed thereby, since he was straddling several fences at the same time. Insofar as Caley the individual was concerned, the counterclaim could be interposed against him. However, Caley as the trustee or representative of the class was immune from liability for his individual acts. As such, a counterclaim, the gravamen of which does not embrace representative or class liabilities would be jurisdictionally defective. Similar to a stockholder's representative, he was protected as was the plaintiff in *Bixon* v. *Beal* (App. Div., New York), 271 App. Div. 505, 66 N. Y. Supp. 2d 425, affirmed, 297 N. Y. 529. Therein the Court said:

> "'Although the present action is not one upon a contract, it is one where the plaintiff who brings it is not interested in her individual capacity in any relief sought. The rule is established that a plaintiff so suing may not be subjected to a counterclaim against her individually.'"

Accordingly, the counterclaim, addressed to uncertain parties could never be constitutionally interposed in the action and the dismissal thereof upon the merits operated to deprive petitioner of his property without due process of law since the judgment of dismissal is a nullity.

Since Caley elected to proceed upon at least three distinct theories each of which required a separate type of capacity, it was impossible to determine which purported

rights were being asserted against petitioner and against respondent so that either party could adequately formulate a defense thereto.

Accordingly, the process and pleadings in this action failed to give either party due notice of what he was being called upon to defend. By reason of the admixture of the parties here was an admixture of the subject matter of the action, as more fully discussed in subdivision "C" of this argument.

Restatement of the Law of Judgments, sec. 6.

Under the circumstances, petitioner was not afforded that notice which would satisfy the requirements of the due process clause of the federal Constitution.

B. The decision and judgment of the Supreme Court of Wisconsin confused the identity of the plaintiff so as to render such judgment as indefinite, alternative and void.

The encyclopedists, in 50 *Corpus Juris Secundum* (Judgments), at section 763, have succinctly stated:

> "In order to constitute a judgment an estoppel there must be a substantial identity of the parties as well as of the subject matter, that is, it is necessary that the parties as between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered, in the same capacities, and in the same antagonistic relation or else they must be in privity with the parties in such former action.
>
> . . . . . .
>
> The rule that there must be a substantial identity of parties as well as of the subject matter, is based

upon the fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the federal constitution and in the constitutions of the several states. * * *"

On its face, the judgment below is ambiguous. The Trial Court directed that judgment be entered in favor of the plaintiff against the defendant for a specified sum (Appendix, p. 110). That judgment was affirmed on appeal (Ex. "C"). The caption of the action, however, purports that such action is brought by plaintiff "individually and as assignee, owner, and on behalf of" others, which others be identified in the bill of particulars as being members of a class united in interest with him.

Again, the encyclopedists in 49 *Corpus Juris Secundum* (Judgments), at section 75, advise:

"A judgment must designate the parties for and against whom it is rendered, or it will be void for uncertainty. * * *

* * * * *

b. Plaintiffs

Plaintiff must be designated in the judgment with sufficient clarity to permit identification. A judgment for or against 'plaintiff', when there are several plaintiffs, or reciting 'plaintiffs' when there is only one, is not void if the persons intended can otherwise be identified.

* * * * *

Representative capacity. Where the judgment is for or against a plaintiff in a representative capacity, that fact must be sufficiently indicated * * *"

To determine the effect of a judgment in an action, the courts are permitted to go behind same and to examine the underlying proceedings as was suggested in *Kincade* v. *Jeffery-De Witt Insulator Corporation* (C. A. 5th Circ.) 142 F. 2d 328, under footnote 5 therein:

> "A judgment in terms 'against' the defendants without particularly naming them, 'in legal effect, is a valid judgment against all who are regularly defendants to the suit; and who are such, is a matter to be ascertained by reference to the process, pleadings and proceedings in the suit.'
>
> Wilson v. Vance, 30 Tenn. 189 (quoted); 49 C. P. S., Judgments §33, p. 75; 30 Am. Jur. (Judgments), Sec. 22.
>
> The style of the cause and the docket number under which it is filed together with the pleadings found thereunder may be regarded to explain the judgment's reference to the parties otherwise than by name and determine the capacity in which liability is adjudged against them.
>
> 30 Am. Jur. (Judgments) Secs. 22 and 23; Stewart v. Senter, 88 W. Va. 124, 106 S. E. 443; Jones v. Johnson, 72 Okl. 134, 178 P. 984, Annotation, 21 A. L. R. 968."

Going behind the judgment in this action, however, one cannot solve the ambiguity, since, the Trial Court never declared the capacity of the plaintiff and the appellate court distinguished the potential capacities while commenting that "(t)he capacity in which plaintiff brings this action is not made perfectly clear".

As it presently stands, the judgment below is an alternative judgment of the type which has generally been declared void.

The "alternative judgment" has been defined in 49 *Corpus Juris Secundum* (Judgments), at section 74, in the following manner:

> "An alternative judgment is a judgment for one thing or another, which does not specifically and in a definitive manner determine the rights of the parties, as where it requires one of the parties to perform one or more alternative propositions. As a general rule, judgments cannot be in the alternative and it has been held that an alternative judgment is wholly void, especially where further action of the court is necessary. * * * *"

Only in cases where the rights of the parties may be discovered from the judgment roll an alternative judgment may be upheld. *Peterson* v. *Overson*, 52 Ariz. 203.

In *Battell & Collins* v. *Lowery, et al.*, 46 Iowa 49, it was observed that:

> "* * * A judgment has been said to be 'the conclusion of the law upon the facts found or admitted by the parties.' *Truett* v. *Legg*, 32 Md. 147. In the case at bar there was an alternative finding of facts. We are of the opinion that such a finding has no validity. The finding that one of two things must be true is not a finding that either is true. No one fact is found absolutely. Yet we think that that it is necessary for the rendition of a judgment. If the finding is alternative, conditional or contingent, the judgment partakes the same character. Such a judgment would be an anomaly, and serve no useful purpose. * * * *"

The judgment at bar is either an affirmance of a set of alternative positions or if is a declaration of no position

at all. The judgment reflected in the light of the opinion of the appellate decision serves not only to leave undefined the nature of the plaintiff's capacity but it confounds the situation by defining such capacity in several inconsistent fashions.

In determining the unconstitutional effect of the judgment below, we must now come to the basic question: Who can claim or must tolerate the effects of a judgment?

As enumerated under subdivision "A" of this argument, if respondent came to the court as an individual solely, then, any judgment in this action would affect his rights alone. If he is here as a trustee, then, his individual rights are not involved and the judgment affects only the beneficiaries he represents in the action. However, if the action is a class action, then, it is those persons in the class who can claim, and are bound by, the adjudications therein.

The importance of this matter is more than a mere matter of legalistic discussion. The courts below were made fully aware that petitioner and another had commenced an action on grounds similar to the counterclaim in this action and that such latter action was pending in the United States District Court for the Western District, Northern Division, of Michigan. (Appendix, pp. 146-162) against, at least, some of the parties to the disputed contract who were not respondent's assignors. Such parties, in that action, have counterclaimed to recover the same $2.00 per share for which respondent sued petitioner in the instant action and assert as a class that they are entitled to a purported *res judicata* benefit of the Wisconsin judgment. The failure of the Wisconsin judgment roll to define the persons who are benefited thereby creates an imaginary *fata morgana* and tends to mislead the courts and the public in subsequent proceedings.

In the Michigan action, the defendants, in effect, are asserting a *res judicata* based upon the dismissal of the Wisconsin counterclaim.

Assuming, *arguendo*, that petitioner's counterclaim could validly have been interposed in the instant action even against Caley in his undefined and uncertain capacity, the Supreme Court of Wisconsin has confused the effect of its judgment of dismissal.

If the counterclaim related solely to Caley the individual, then only Caley can come into Michigan and plead the bar.

This multiple confusion of the parties originated by Caley, compounded by the Trial Court and expanded by the appellate court has rendered this judgment so uncertain as to the parties and the subject matter thereof that same is incapable of being determinative of any rights or obligations.

Accordingly, such void judgment and the affirmance thereof operates to deprive petitioner of his property without the constitutional safeguards guaranteed to him.

C. Section 263.12, Wisconsin Statutes, is unconstitutional.

Under the construction of section 263.12, Wisconsin Statutes, as declared by the highest court of the State of Wisconsin, in this action, it is now the law of such state that where a party defendant fails to object, by demurrer or answer, that the party plaintiff is not identified and not identifiable from the record, such objection is waived.

Such statutes so construed, is unconstitutional in that it bars a jurisdictional objection relating to the subject matter of the action.

While the statute, on its face, provides for the constitutional preservation of an objection relating to the jurisdiction over the subject matter of the action, the present construction classifies an objection relating to non-identification and non-identifiability of party plaintiff as not being an objection to jurisdiction over the subject matter.

Jurisdiction over the subject matter has been held to relate to the right of a court to hear and decide and jurisdiction of the parties concerns itself merely with the parties' personal privileges. *Employers Mutual Liability Insurance Co. of Wisconsin* v. *Andrus*, (D. C. N. D. Ala.) 39 F. Supp. 605.

Likewise, in *Monarch Anthracite Mining Co.* v. *Coffin*, (C. C. A. Pa.) 102 Fed. 2d 337, it was said that jurisdiction over the subject matter relates to the judicial power of the court to determine the cause while jurisdiction of the person of a defendant relates to whether such party is properly before the court and subject to its adjudications.

Thus, in *Reasing* v. *Turner Aviation Corp.*, (D. C. N. D. Ill.) 166 F. Supp. 790, it was held that since jurisdiction over the subject matter concerns the fundamental power of a court to hear and decide a case on its merits it is beyond the capacity of the litigants to confer such power upon the court.

Accordingly, in *Munday* v. *Vail*, 34 N. J. L. 418, it was observed that:

> "It is impossible to concede that because A and B are parties to a suit a court can decide any matter in which they are interested whether such matter be involved in the pending litigation or not."

Freeman on Judgments, 5th Ed. page 738;
Boyle v. *Public Adjustment & Construction Co.*, 87 Ohio App. Rep. 264.

As an instance, if the complaint sets forth a cause of action on behalf of an individual only, then, to hold that the action is stated on behalf of a class or of numerous parties is to find a different subject matter and to apply the same where it never existed before within the framework of the pleadings. For, the assertion of an individual's claim differs structurally from that of a representative's claim.

In order for the appellate court herein to grant a judgment covering the members of the purported class it would be required to find before it an action the subject matter of which could be extended to a class of persons. It is the subject matter of the action which determines a class action, and not the name of the plaintiff.

Thus, petitioner could not be barred from contesting the jurisdiction over the subject matter at any time during the action by an objection to the non-identification and non-identifiability of party plaintiff. To the extent that the appellate court has held that the objection was waived by reason of said section 263.12, Wisconsin Statutes, it must be concluded that such statute is unconstitutional.

D. In refusing to rehear the issue of waiver of the jurisdictional objection raised for the first time by the Supreme Court of Wisconsin, such appellate court denied petitioner due process of law.

The theory of jurisdictional waiver arose in the first instance in the decision of the appellate court. Petitioner thereupon moved for a rehearing upon the constitutional questions created by such decision, such constitutional questions not having manifested themselves at any time prior during the proceedings. A rehearing was denied.

It is an axiomatic principle that due process of law involves timely notice and the opportunity to be heard.

In the *Restatement of Laws of Judgments*, section 6, the codifiers say:

> "* * * a judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to the persons affected."

However, when petitioner sought to be heard, for the first time, on the problem created by the appellate court, a problem which could not be ascertained until the publication of such decision, his motion was denied.

It is submitted that in denying a hearing to petitioner upon the issues created by the appellate court such court abridged petitioner's constitutional right to the protection of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

WERNER GALLESKI,
Attorney for Petitioner.

Of Counsel.
ARNOLD DAVIS.

EXHIBIT "A"

No. 20

AUGUST TERM, 1959

STATE OF WISCONSIN

IN SUPREME COURT

WILLIAM H. CALEY, etc.,

Respondent,

v.

ALBERT FLEGENHEIMER,

Appellant.

APPEAL from a judgment and order of the circuit court for Brown county: E. M. Duquaine, Circuit Judge. *Affirmed.*

On November 26, 1956, William H. Caley commenced an action against Albert Flegenheimer. The complaint alleged that Caley had owned certain shares of common stock of Superior Sugar Refining Company and that he brought the action in his own behalf and on behalf of numerous other former stockholders who had assigned their causes of action to him. It was alleged that in June of 1954, defendant obtained options to purchase 18,564 shares at the price of $6 per share; that in July of 1954, defendant exercised the option and purchased from plaintiff and his assignors 17,959 shares, payable $4 upon exercise of the option and the balance payable at the rate of

$1 per share on July 4, 1955, and $1 per share on July 4, 1956; that the defendant failed to pay the $1 per share due on each of the dates for deferred payment.

In defendant's amended answer and counterclaim it was alleged, among other things, that the selling shareholders knew, or should have known, the specific identity of the party other than the defendant who purchased stock and that defendant's obligation would be only for such stock that was purchased by and in his name; that the sole right of the selling shareholders in the event of default on the deferred payments was to have the escrow agent sell the deposited stock for the benefit of the selling shareholders. The answer also contained a counterclaim alleging fraudulent representations as to the physical condition of equipment and facilities of the company, and that these representations were made by persons acting in behalf of the selling stockholders; that defendant had relied upon these representations and had purchased, in his own name, 2,665 shares for which he paid $10,660; that the stock became worthless because the equipment and facilities were not as represented and that he had, therefore, been damaged in an amount in excess of the amount he had paid for the shares in his name.

A number of the material facts alleged in the counterclaim were denied in plaintiff's reply.

Defendant did not plead fraud as a defense to the plaintiff's claim for the amount of the deferred payments.

The issues came on for trial before a jury, starting November 12, 1958, and upon motion of the plaintiff at the close of the trial, the court directed a verdict in favor of plaintiff for the two deferred payments of $1 per share, totalling $35,574, with interest, and also ordered that defendant's counterclaim be dismissed upon its merits.

Defendant appealed from the judgment entered accordingly on December 15, 1958.

In June, 1954, the plaintiff and his assignors and others had deposited their shares of stock with the First National Bank of Menominee, Michigan, and had there signed an instrument entitled "Option" prepared by Mr. Morris, defendant's attorney, dated June 23, 1954, and reading as follows:

> "We, the undersigned being individually the owners of a number of shares of common stock in Superior Sugar Refining Company, a Michigan Corporation of Menominee, Michigan which is set opposite our respective signatures do hereby grant to Albert Flegenheimer and or Albert Flegenheimer and Associates of New York City, New York and to his heirs and assigns for a period of ten (10) days from the date hereof the option of purchasing from each of us whose signatures appear hereon the common stock of Superior Sugar Refining Company in the number of shares that appear opposite our said signatures and we do, each of us, individually, agree to sell to the said Albert Flegenheimer and or Albert Flegenheimer and Associates at any time within ten (10) days the said common stock as stated for the agreed sum of Six ($6.00) Dollars per share in the following manner and subject to the following conditions.
>
> "The purchaser or purchasers are to pay the sum of Four ($4.00) Dollars per share at the time of the exercise of this option and the balance of Two ($2.00) Dollars per share to be paid One ($1.00) Dollars per share in each of the succeeding two years on or before the 1st day of July, in each year.
>
> "The stock to be sold hereunder is to be delivered to the First National Bank of Menominee, Michigan

as escrow bank and said stock is to be pledged by said purchaser or purchasers and held by the said bank as collateral security to guarantee the payment of the deferred purchase payments."

No action to exercise the option was taken within the period of 10 days from its date. On July 7, 1954, defendant, Mr. Morris, and a Mr. Page called upon Mr. Odgers, president of the First National Bank of Menominee, and ascertained that 18,564 shares were then on deposit with the bank. There was executed by defendant and Mr. Odgers on behalf of the bank a document entitled "Escrow Agreement" which reads as follows:

"THIS AGREEMENT made and entered into this 7th day of July, 1954 by and between Albert Plegenheimer of New York City, New York, individually and as agent for undisclosed principals, party of the first part and the First National Bank of Menominee, Michigan, a Michigan Corporation, party of the second part.

"WITNESSETH:

"WHEREAS, the first party is desirous of purchasing common stock of Superior Sugar Refining Company, a Michigan Corporation of Menominee, Michigan and has optioned the purchase of a number of shares of said stock from the registered holders thereof which options are deposited with the second party, and

"WHEREAS the purchase of said stock as aforesaid contemplates payment of a part of the purchase price by deferred payments and will require the services of the second party as an escrow agent to properly carry out the terms and conditions of the purchase and sale of said stock

"Now THEREFORE, in consideration of the sum of One ($1.00) Dollar and other good and valuable consideration and the mutual premises, covenants and agreements herein contained, it is stipulated and agreed as follows:

"First party hereby appoints the First National Bank of Menominee, Michigan as escrow agent for him and for the benefit of the persons from whom the aforesaid stock is to be purchased and second party hereby agrees to act as such escrow agent in accordance with the terms hereof.

"First party agrees to deposit with second party sufficient money with which to carry out the terms of this agreement to purchase the stock as shown in the stock option agreements which first party has elected to exercise.

"Second party is to notify all of the persons who have optioned their stock on said options of first party's election to exercise the option and to direct said persons to deposit their stock with second party with proper assignment thereof in blank attached thereto or endorsed thereon with Federal transfer stamps attached. That when second party has deposited with it all of the stock represented on said option agreements, to-wit 18,964 shares and said stock has been transferred and re-issued as provided herein it will pay out of the funds deposited by first party the sum of Four ($4.00) Dollars per share to the owner of the stock depositing same. The depositing stock will be delivered by second party to the transfer agents of Superior Sugar Refining Company with directions that said stock be transferred on the books of the corporation to and re-issued in the name of Albert Flegenheimer and or persons, firms or corporations designated and named

by him and returned to second party to be held as collateral security to the payment of an additional Two ($2.00) Dollars per share to the persons depositing said stock under this agreement which said additional deferred payment of Two ($2.00) Dollars is to be paid at the rate of One ($1.00) Dollar per share per year on the 1st day of July in each succeeding two (2) years. When the deferred payments have been paid as aforesaid second party is to deliver all deposited stock to first party.

"Second party is to issue receipts for all deposited stock which receipt shall state that the stock is being deposited in accordance with the terms and conditions and for the purpose of carrying out the provisions of this agreement.

"In the event of default in payment of either of the deferred payments as aforesaid when the same becomes due said second party will then offer all of the shares so held in escrow for sale and from the proceeds of said sale make the deferred payments herein agreed to be made to the extent that the proceeds of said sale will make such payments rendering and paying the surplus, if any, to the record holders of said stock in ratio to their respectful stock holdings.

"The transfer agent of the Superior Sugar Refining Company is hereby authorized and directed to make the transfer of stock on the books of the corporation as directed by the second party.

"That so long as no payment under this agreement is in default the voting rights of said stock are to be in the name of the registered holders of said stock on the books of the corporation. In the event of a default of any payment hereunder the escrow bank shall give notice to the secretary of said cor-

poration of such default and thereafter and until such default is rectified all voting rights in the deposited stock shall be vested in the second party.

"IN WITNESS WHEREOF the parties hereto have caused these presents to be executed the day and year first above written."

On July 7, Mr. Odgers stated that before he would resolicit the owners of the stock then on deposit with the bank it would be necessary for defendant to deposit the money covering the initial payment. In the afternoon of July 7, the bank received a wire from the National Bank of Detroit reading, after being decoded:

"We credit your account $100,000 for account of Albert Flegenheimer, by order of River Farms, Ltd., and Royal Bank of Canada—First Trust & Deposit Co., Winnipeg, Man. Canada."

Mr. Morris wrote to Mr. Odgers on July 23, 1954, as follows:

"Enclosed herein you will find copies of transmittible notices to accompany the checks for the initial payments under the Contract Purchase Agreement for the option stock in Menominee Sugar Company and Superior Sugar Refining Company.

"I have attempted to simplify this so it will not require any addressing or insertion and I suggest possibly the same could be prepared on mimeographed forms."

The bank was also acting as escrow agent in a companion transaction, the purchase of stock of Menominee Sugar Company.

On July 27, 1954 the bank sent out checks on the account of Albert Flegenheimer, signed in his name by the bank as escrow agent, to the selling stockholders for amounts equivalent to $4 per share. Accompanying the check was a notice in the form prepared by Mr. Morris and reading as follows:

> "To the Stockholders of
> Superior Sugar Company
>
> "The enclosed check payable to your order represents the initial payment of Four ($4.00) Dollars per share on the purchase price of your common stock in Superior Sugar Refining Company.
>
> "Under the terms of sale the purchase price is Six ($6.00) Dollars per share and the balance of Two ($2.00) Dollars per share is payable in two (2) annual installments of One ($1.00) Dollar per share on July 1st, 1955 and July 1, 1956.
>
> "The First National Bank of Menominee, Michigan is the escrow agent for the purpose of carrying out the sale agreement and all stock sold under this agreement is being held by the escrow agent to secure the payment of the deferred balance."

On July 27 also the certificates for 18,676 shares of stock were turned over to the assistant secretary of the Superior Refining Company for transfer, and on the same date certificates were returned by the assistant secretary to the bank 17,500 shares being registered in the name of River Farms, Ltd., and the balance, severally, in the names of Ernest Flegenheimer, Walter Page, Wm. F. Morris, and Albert Flegenheimer. Mr. Morris testified that Mr. Odgers had been informed on July 7 that the stock would be purchased by these parties.

Mr. Odgers testified that he issued no further receipts for the optioned stock after July 7, and that prior to July 27, none of the stockholders had seen the escrow agreement. Mr. Morris testified that on July 7, Mr. Odgers had promised to re-solicit the stockholders, but there was no evidence of any communication with them except the letter of July 27th and accompanying check.

It is undisputed that the deferred payments of $1 per share were never paid. The stock remains in the hands of the bank and the company is in receivership.

Facts material to issues other than defendant's personal liability for the deferred payments will be referred to in the opinion.

FAIRCHILD, J. The notice of appeal embraces a judgment and five orders, one of which was a denial of a motion for summary judgment. The other four orders were not appealable but may, of course, be reviewed on appeal from the judgment. The questions presented are: (1) Whether the purchaser agreed unconditionally to pay the deferred payments; (2) Whether the defendant is liable for such payments on stock purchased in the names of others; (3) Whether the assignments to plaintiff permit him to prosecute the assigned causes of action; (4) Whether personal representatives appointed in other states must qualify in Wisconsin before assignments by them can be recognized; (5) Whether the circuit court should have declined to entertain the action or should have stayed it pending the outcome of another action; and (6) Whether the dismissal of defendant's counterclaim should have been without prejudice.

We conclude for the reasons which follow that the judgment and the appealable order are to be affirmed.

1. *Liability of the purchaser for the deferred payments.* The plan for the sale of the stock contemplated

that the purchaser make an initial payment of $4 per share followed by two deferred payments of $1 per share each, payable one and two years after the initial payment. Plaintiff's theory is that the purchaser agreed unconditionally to pay each of the deferred payments. Defendant claims that if the purchaser determined not to make the deferred payments, the stock was to be sold and the proceeds used to the extent they were sufficient to pay the amounts in default, the purchaser being entitled to the surplus, if any. Plaintiff considers the deposit of the stock with the bank as security for defendant's obligation to pay the deferred payments. Defendant considers that if the purchaser elected not to make the deferred payments, the selling stockholders could look only to the proceeds of the deposited stock. Because the company later went into receivership, the value of the stock, if it has any, is questionable. This action was brought to enforce the alleged personal liability of defendant for the unpaid deferred payments.

It is evidently conceded that if the offer set forth in the option had been accepted before it expired, the purchaser would be personallly liable for the deferred payments as claimed by plaintiff, notwithstanding the provision in the option for the pledge of the stock as collateral security. There can be no other interpretation of the language of the option. Defendant relies upon the fact that the record discloses no act which could constitute an exercise of the option before July 7th. Plaintiff can point to no earlier act except a deposit of $60,000 on July 2d to defendant's account with the bank, and to the recital in the agreement executed July 7th that defendant "has elected to exercise" the option. Defendant contends that the offer contained in the option expired without acceptance and that the escrow agreement constituted a new offer by defendant. He contends, further, that this new offer was

never accepted and that there was never a contract, or else that the new offer was later accepted and that the escrow agreement, not the option, set forth the terms of the contract.

Defendant suggests that under the escrow agreement, defendant is not bound unconditionally to pay the deferred payments, but that the sellers have no more in the event of default than the right to have the stock sold and the proceeds applied to the amount unpaid. Defendant asserts that even if the escrow agreement does not clearly provide as he contends, it is; at least, ambiguous in this respect and he should have been permitted to prove the intention of the parties by parol evidence.

We must agree with defendant that on July 7th, when the escrow agreement was executed, it was too late for an acceptance of the offer contained in the option, and the record discloses no act previous to that date which would constitute an acceptance. It is quite clear, however, from the terms of the escrow agreement that the bank and the defendant considered that the option had been exercised and that the escrow agreement was made for the purpose of implementing the provision in the option for the pledge of the stock with the bank as collateral security to guarantee the payment of the deferred payments. The escrow agreement has been set forth in full in the statement of facts. It will be noted that the options then in the hands of the bank are referred to and that the agreement recites that defendant "has elected to exercise" the options. While the escrow agreement provides prospectively for the deposit of 18,564 shares with the bank, it is clear that that exact number of shares were then on deposit. The agreement provides that after the initial payment has been forwarded to the selling stockholders and after transfer of the stock to the names of the defendant and his designees, the stock is "to be held as collateral security to the pay-

ment of an additional Two ($2.00) Dollars per share . . . which said additional deferred payment of Two ($2.00) Dollars is to be paid at the rate of One ($1.00) Dollar per share per year on the 1st day of July in each succeeding two (2) years."

We find nothing in the escrow agreement to indicate any intention that the terms of sale would differ in any respect from the terms set forth in the option.

We find nothing in the record to show that the selling stockholders ever gave the bank authority to contract for the sale of their stock. It may seem strange that both the bank and the purchaser proceeded with the transaction if in fact the option had not been timely exercised or some extension or ratification obtained from the stockholders. Nevertheless this appears to have been the situation. So far as the record shows, any of the selling stockholders may have been at liberty to reject the check mailed to them on July 27th and decline to sell. So far as the record shows, the letter from the bank to the stockholders, drafted by defendant's attorney, and the accompanying check constituted, in law, the communication of an offer by the defendant to buy. While the letter of transmittal did not refer to the option, such reference may well have been implied under the circumstances. Aside from that implication, however, the letter of transmittal did contain a reference to the purchase price of $6 per share, to the $2 balance being payable in two annual installments, and to the deposit of the stock to secure the payment of the deferred balance. While it may be true that there was no contract in existence between defendant and any selling stockholder until the stockholder cashed the tendered check, we have no doubt that by then at the latest a contract came into being under the terms of which defendant had promised to pay the sum of $6 per share, and had become un-

conditionally liable for the amount of the deferred payments.

2. *Defendant's liability for stock registered in the name of others.* It is undisputed that on July 27, 17,500 shares of stock were registered in the name of a corporation known as River Farms, Ltd. Defendant asserts that at least as to these shares, he was acting merely as agent for River Farms, Ltd., and that its identity as his principal was disclosed before there was any contract. He contends that liability with respect to these shares would not rest upon him and that the recovery in this action must be limited to the amount of the deferred payments on the shares taken up in defendant's name. The parties appear to agree as to the rules of law involved and there is no contention that the applicable law of Michigan differs from that of Wisconsin.

Defendant relies upon testimony that Mr. Odgers, president of the bank, was advised orally on July 7th that 17,500 shares of the stock were to be registered in the name of River Farms Ltd., upon the telegram received that day by the bank indicating that River Farms, Ltd. was providing the $100,000 deposited to defendant's account for use in paying for the stock of Superior Sugar Refining Company and Menominee Sugar Company, and upon the bank's knowledge on July 27th of the registration of the certificate of stock.

There was no evidence that any information concerning River Farms, Ltd. was ever communicated to any stockholder. So far as the record shows, all the information that any stockholder had, except that some of them had met defendant, was contained in the option and in the letter of July 27th and accompanying check. The option named, the optionees as "Albert Flegenheimer

and or Albert Flegenheimer and Associates of New York City, New York." The name of the purchaser did not appear in the letter of July 27th but the check which accompanied it was signed in the name "Albert Flegenheimer" by the bank as escrow agent. Defendant evidently relies upon a theory that the bank was the agent of the stockholders and that the knowledge of the bank as to the identity of River Farms, Ltd. must be imputed to the stockholders. The option signed by the stockholders named the bank as the prospective escrow bank, and the deposit by the stockholders of their stock with the signed option may have implied that the bank was authorized to receive the acceptance of the offer on behalf of the stockholders. We find nothing, however, to support the argument that the bank was authorized to act for the stockholders in any manner beyond the exercise of the option and the duties of escrow agent. Therefore, any knowledge of the officers of the bank of the identity of those who were to purchase portions of the stock was immaterial. There was no material issue of fact to be decided by the jury, and the circuit court properly directed the verdict.

3. *Plaintiff as real party in interest.* The capacity in which plaintiff brings this action is not made perfectly clear. He is designated in the caption as "William H. Caley, Individually and as assignee, owner, and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company, Plaintiff." In the first paragraph of the complaint, he alleged that he "was the owner of five hundred sixty-three (563) shares of the common stock of the Superior Sugar Refining Company and that he brings this action in his own behalf and on behalf of numerous other stockholders of said Superior Sugar Refining Company, which cause of action was duly assigned to him by stockholders who were the own-

ers of seventeen thousand three hundred ninety-six (17,396) shares of said common stock." Elsewhere he alleged the sum "now due plaintiff herein for his benefit and the benefit of his assignors." In the verification he deposed that he "is one of the plaintiffs" and that he "is united in interest in this action on behalf of certain common stockholders of the Superior Sugar Refining Company and that this verification is made in his own behalf and on behalf of his assignors."

Upon the trial plaintiff produced 49 assignments in the following form:

> "For the purpose of enforcing collection of the two dollars balance per share due the undersigned from Albert Flegenheimer and Albert Flegenheimer and Associates under the contract of sale of certain . . . shares of the Common stock of the Superior Sugar Refining Company made the 23rd day of June, 1954, and in default since July 1, 1955, I hereby assign, transfer, and set over unto William H. Caley of Menominee, Michigan, all of my right, title and interest in the said stock and in said contract under the following terms and conditions:
>
> "1. That he will prosecute suit against Albert Flegenheimer and Associates to enforce collection of the balance due under said contract.
>
> "2. That after payment of the expenses of said suit he will pay the undersigned his share of the net proceeds of any recovery in said action, computed in the ratio of the number of shares hereby assigned to the total number of shares represented by William H. Caley in this suit.
>
> . . . . . "Stockholder
>
> "Date: May . . . , 1956"

Defendant claimed in the later stages of the action in circuit court, and claims upon appeal, that these assignments are conditional in form; that plaintiff is not the real party in interest as to the assigned causes of action, and that it is improper to permit plaintiff to sue upon the assigned causes of action because defendant has a counterclaim against the assignors which cannot be asserted against plaintiff. In the answer and amended answer, defendant was content, on this score, to state that he had no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of the complaint. The amended complaint was verified May 8, 1958, although on January 22, 1958, defendant had adversely examined plaintiff and the form of the assignments was then made known if not before.

It would appear that plaintiff may have been attempting to qualify as a single plaintiff, suing for the benefit of "many persons" with a common interest or of "very numerous" parties under sec. 260.12, Stats.; or may have considered himself a trustee of an express trust so as to be authorized to sue without joining the beneficiaries under sec. 260.15, Stats. Plaintiff now argues that the assignments were absolute, although this argument is inconsistent with the use of language indicating suit on behalf of others. It is clear that the assignors were satisfied to have the action maintained by plaintiff. As to all these matters, i.e., whether the circumstances permit a single plaintiff to maintain an action under sec. 260.12, or whether the assignments constituted plaintiff a trustee so that he could sue without joining the assignors under sec. 260.15, or whether the assignments made him the real party in interest so that he complied with sec. 260.12, we deem that any objections defendant might have been entitled to raise should have been raised prior to or at the time of answer and were waived by failure to do so. Sec. 263.12, Stats., provides:

"Except as provided in s. 262.17, if not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction over the subject matter, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action."

Defendant did move on August 8th, 1958, that all references to the assigned causes of action be stricken from the complaint. He based his motion upon the existence of his counterclaims against the assignors and upon a reference to sec. 260.13, Stats., requiring that every action must be prosecuted in the name of the real party in interest. The motion was denied "for the reason that it is lacking in merit and for the further reason that it comes too late." An appeal from this order was dismissed by this court. At the hearing of motions on May 26th, the court stated that if a jury were not waived, the trial would take place late in June, but that if a jury were waived the case could be tried during the summer. On June 2nd, 1958, defendant, through counsel then representing him, waived a jury and requested that the case be scheduled for trial in August because of commitments for June and July. On July 21st, August 26th was fixed as the date of trial. Substitution of counsel occurred thereafter. Under the circumstances the circuit court was well within its discretion in denying the motion to strike, made August 8th and heard August 18th.

Defendant sought to raise the same issue on two subsequent occasions. On October 31st, 1958, he moved for summary judgment dismissing the assigned causes of action. On December 15th, 1958, after trial, defendant moved to dismiss the assigned causes of action for similar reasons. Both motions were denied. The issue was not raised in the plead-

ings and could not be properly brought before the court on either the motion for summary judgment or the motion for dismissal after the trial. It is thus unnecessary to consider whether there would have been merit to the objections if timely made.

4. *Qualification of personal representatives appointed in other states.* Several of the selling stockholders were executors or administrators appointed in Michigan probate proceedings. Others were trustees of express trusts. All are apparently resident in Michigan. Plaintiff is a Michigan resident and Superior Sugar Refining Company is a Michigan corporation. The selling stockholders who were personal representatives or trustees and who had sold stock to defendant in that capacity assigned their causes of action to plaintiff. Defendant does not attempt to show that they lack authority under the law of Michigan to assign whatever cause of action they have, but argues that the assignments must not be recognized in a Wisconsin court because none of them filed his original appointment or a certified copy of it in any county court in Wisconsin. Defendant relies upon sec. 287.16, Stats., providing that when no executor or administrator has been appointed in this state or the estate of any nonresident decedent, the foreign executor or administrator may, upon such filing, exercise any power over such estate, including sales and assignments, and prosecute any action to collect the demands of such estate which an executor or administrator appointed in Wisconsin could have or exercise. The cause of action here assigned is transitory and intangible property; and the assignments appear to have been validly made in Michigan by Michigan executors, administrators and trustees to a Michigan resident. Defendant objected to the receipt in evidence of these assignments upon the ground that there had been no filing in Wisconsin. Defendant suggests no reason why the assigning trustees were required to take

qualifying action in Wisconsin, and we see no reason why either the trustees or the personal representatives must do so.

Defendant raised this point in seeking summary judgment on October 31st, and in moving to dismiss on December 15th. The denial of his motions in this respect was also correct.

5. *Whether action should have been maintained in a Wisconsin court.* On January 11th, 1957, defendant gave notice that he would move for dismissal of the action on the grounds that plaintiff and defendant were both non-residents of Wisconsin, and that the contract upon which the cause of action is based is a Michigan contract. In opposition, plaintiff filed an affidavit asserting, among other things, that defendant had ceased to do business in Michigan and was not subject to service of process in Michigan; that defendant was operating the Menominee Sugar Company with principal offices in Green Bay, Wisconsin, stock in which was purchased in a companion transaction; that defendant is an international financier with interests in Canada and several European nations, as well as in several states of the United States; that plaintiff did not know of any place where process could be served upon him except Green Bay, and it would involve great effort and expense to try the action in any other jurisdiction. The written decision of the court indicates that upon hearing defendant broadened his original motion so as to rely upon the rule of *forum non conveniens*. The court indicated its view that defendant had not made a proper showing for dismissal under this doctrine adverting, among other things, to the defendant's studied avoidance, apparently referring to defendant's motion papers, of disclosing his state of residence and his home address. This motion was addressed to the discretion of the court, and it cannot be said that the discretion was abused.

On May 13th, 1958, defendant applied for a stay, pending the outcome of an action in the U. S. District Court for the Western District of Michigan. This action had been commenced on May 6th, 1958. In the federal court action, defendant and River Farms, Ltd. were plaintiffs and plaintiff, together with many of plaintiff's assignors were defendants. The complaint in federal court relates to the same transaction and alleges seven counts against some, or all of the federal court defendants, alleging fraud, misunderstanding, mutual mistake, and breach of warranty and seeking various types of relief including $500,000 damages and rescission of the sale.

The defendant contends that it was an abuse of discretion to deny a stay in the Wisconsin action pending trial in the action in federal court. Defendant points out that the federal court had personal jurisdiction over River Farms, Ltd. and a great many of the stockholders besides plaintiff Caley. The court denied the motion for a stay, but granted another motion of the defendant to permit amendment of his answer and counterclaim. The amended counterclaim incorporated several claims of fraud not included in the original counterclaim.

The motion for stay was directed to the discretion of the court and under the circumstances, we do not find that the discretion was abused. The summons and complaint were served November 26th, 1956, so that the Wisconsin action had been pending 17 months before the commencement of the federal court action. There were several motions, including a motion to dismiss on the ground of *forum non conveniens* brought by defendant and decided February 25th, 1957. The original answer and counterclaim were served April 19th, 1957. Reply to counterclaim was served May 7th, 1957. Notice of trial was filed September 26th, 1957. An adverse examination of plaintiff was taken January 26th, 1958. Had defendant submitted himself at an

earlier date to the jurisdiction of a court in Michigan, the various advantages to be gained from adjudication in a forum where many of the parties resided might have been urged by defendant with more force. Under the circumstances, defendant's commencing the action in federal court on May 6th, 1958, when trial of the Wisconsin action was imminent, may well have suggested that defendant was more interested in delay than in the advantages of the Michigan forum. Defendant attempted to raise these issues again by motion for summary judgment, and, after trial, for dismissal. The motions were properly denied.

6. *Dismissal of defendant's counterclaim upon the merits.* Shortly before the trial, defendant moved to amend his counterclaim so as to allege that although he personally deposited $4 per share for 2,265 shares, he acquired only 976 shares from the plaintiff and his assignors, and acquired the balance from other persons. The amendment was granted so that his prayer for damages on the counterclaim amounted to $3,904. Just before the commencement of the trial, there was a discussion between court and counsel off the record after which the court said to defendant's attorney: "You just said if you litigate the fraud issue. Of course it's optional with you to substantiate your allegations of fraud and the burden of proof is upon you as to fraud. That issue is in the case and will be disposed of in this litigation because the attorneys for the plaintiff insist. Whether you propose to furnish proof of the fraud is a matter wholly in your control." Defendant's counsel replied: "Well our present intention is not to litigate the issue of fraud but if we are sufficiently maligned or if the testimony is provocative so that the jury might be prejudiced on the contract issues, then we might have to bring it up. But we would prefer not to but ——" (Court interrupting) "Well I trust that all attorneys will keep in mind that on contract issues it is hard to see any occasion to

malign anyone or bring in any inflammatory matter." At the close of the testimony, defendant moved for a nonsuit without prejudice on the defendant's counterclaim, noting that there had been no testimony presented on that claim. The plaintiffs opposed the motion, stating that they came prepared to try the issues on the counterclaim and felt that they were entitled to judgment on the merits. The court denied the motion for a nonsuit and ordered dismissal on the merits.

A party does not have an absolute right to a dismissal without prejudice. *Obermeier* v. *Milw. R. R. & L. Co.* (1922) 177 Wisc. 490, 495, 188 N. W. 603; *Burling* v. *Burling* (1957) 275 Wis. 612, 82 N. W. 2nd 807. Therefore, the motion was addressed to the discretion of the circuit court. Under the circumstances, we think that the circuit court did not abuse its discretion. For some reason, defendant asserted fraud only in his counterclaim as a basis for a return of his initial payment. It is difficult to understand why he did not allege fraud as an alternative defense to the plaintiff's cause of action for the unpaid deferred payments. Had he asserted fraud as a defense and failed to prove it, he could not have claimed that the fraud issue was not decided against him. The statement of defendant's counsel above quoted suggests that the fraud counterclaim was injected largely for tactical purposes. Dismissal without prejudice would leave it available for similar use elsewhere. Defendant's failure to move for dismissal without prejudice at an earlier stage caused plaintiff the effort and expense of preparing for trial of the fraud issue. Had defendant moved promptly after May 26th for leave to discontinue his counterclaim so as not to embarrass his similar claim in the federal court action, a different question would have been presented.

By the Court: Judgment and order denying summary judgment affirmed.

EXHIBIT "B"

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday of August, A. D. 1959, on the 29th day of the term, to-wit: On the First day of December A. D. 1959 Present John E. Martin, Chief Justice, Grover L. Broadfoot, Timothy Brown, George R. Currie, Thomas E. Fairchild, E. Harold Hallows, and William H. Dieterich, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

Appeal from Circuit Court,
Brown County, State of Wisconsin

William H. Caley, individually and as assignee, owner, and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company,

Respondent,

v.

Albert Flegenheimer,

Appellant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered and adjudged by this Court, that said motion be, and the same is hereby, denied with $25.00 costs.

State of Wisconsin
Supreme Court—SS.

I, Gordon Samuelsen, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 12th day of January A. D. 1960.

Gordon Samuelsen /s/
Clerk of the Supreme Court of
the State of Wisconsin

(Seal)

EXHIBIT "C"

On the 6th day of October, A. D. 1959, the same being the 12th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Brown Circuit Court.

Opinion by Justice Fairchild.

William H. Caley, individually and as assignee, owner, and on behalf of the owners of 17,396 shares of the common stock of the Superior Sugar Refining Company,

Respondent,

v.

Albert Flegenheimer,

Appellant.

This cause came on to be heard on appeal from the judgment and order of the Circuit Court of Brown County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and order denying summary judgment, of the Circuit Court of Brown County, appealed from in this cause, be, and the same are hereby, affirmed, with costs against the said appellant taxed at the sum of Two Hundred Ten Dollars and Seventy Cents ($210.70).